

sibilities under international law are circumscribed by the relevant constitutive documents and the applicable international customary norms.⁸⁵

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Arising out of ... the Employment: Employees' Compensation and *United Ford Development Limited*

Introduction

For an injured worker in Hong Kong to qualify for compensation under the Employees' Compensation Ordinance, it is not enough to prove that the accident causing the injury arose in the course of the employment.¹ According to s 5(1) the worker must also show that the accident arose 'out of the employment.'² The judicial interpretation to be put on this curiously worded phrase has considerable practical importance. Recently, for instance, a number of employees of the Shamshuipo branch of the Hong Kong and Shanghai Bank were killed when an intruder, apparently motivated by a personal grudge against one of the staff, threw a firebomb into the bank's premises.³ Although that accident certainly arose in the course of the employment of the bank's staff, it is not entirely clear that the accident would (if litigated) also be held to have arisen out of the employment. This note will consider the 'arising out of the employment' requirement in the light of a recent decision of the Hong Kong Court of Appeal, *Fung Yin-yee v United Ford Development*,⁴ a decision which, it will be shown, clarifies the meaning of that requirement and in the process advances the position of workers in Hong Kong seeking compensation under the Employees' Compensation Ordinance.

⁸⁵ For an analysis of the content and extent of Hong Kong's international personality, see R Mushkat, 'Hong Kong as an International Legal Person' (1992) 6 *Emory International Law Review* 105, 123–70.

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¹ Although this is a condition for compensation: s 5(1). It involves essentially temporal and spatial considerations, conditioned by reference to the worker's service: *Dover Navigation Co v Isabella Craig* [1940] AC 190, 199. Put more simply, the worker must be shown to have been doing the employer's work when injured.

² More fully, s 5(1) requires 'personal injury by accident arising out of and in the course of the employment ...'. Therefore it is a further requirement that the worker was injured by 'accident,' as opposed to a continuing process, as explained recently in *Wong Chick v Swire Pacific Limited* (1992) HCt, ECCNo 165 of 1991 (noise over a course of years causing deafness not an accident). And finally, the worker must show that he was engaged in a contract of service (s 2(1)), as opposed to a contract of services, the current judicial interpretation of which is to be found in the Privy Council decision in *Lee Ting-sang v Chung Chi-keung* [1990] HKLR 764.

³ *South China Morning Post*, 11 January 1994.

⁴ (1993) Civ App No 149 of 1992.

The Hong Kong provision

The 'arising out of the employment' requirement has troubled the Hong Kong courts for some time. An important feature of the Hong Kong legislation, as with the comparable English legislation,⁵ is the use of the conjunctive as opposed to the disjunctive in requiring that the accident arise out of *and* in the course of the employment. This can be compared with some of the more progressive Australian and Canadian jurisdictions, where the disjunctive is used.⁶ Work-related injuries will more easily attract compensation in those jurisdictions because one or the other (not both) of these conditions need be established. An accident that occurs while the employee is working is, quite simply, an accident that arises in the course of the employment and, without more, will attract compensation. In Hong Kong the wording of s 5(1) effectively disqualifies from compensation a considerable number of injured workers: those who cannot prove the additional requirement, that the accident arose 'out of the employment.'

In Hong Kong such a worker may be assisted by the presumption in s 5(6) of the Ordinance.⁷ Under s 5(6) 'an accident arising in the course of an employee's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment.' The burden shifts to the employer to establish that there is some evidence that the accident did not arise out of the employment. Only in the face of such evidence will a worker who has been injured while working actually be required to prove that the accident arose out of the employment.

Traditional interpretation

The traditional judicial interpretation of the 'arising out of the employment' requirement has treated the matter primarily as one of causation, having regard to the *nature* of the work. The accident must have arisen out of a risk peculiar to the employment. Lord Sumner put it thus: 'Was it part of the injured person's employment to hazard, to suffer or to do that which caused his injury?'⁸ The worker must show either that the accident would not have occurred but for the employment, or at least that there was a material connection between the work and the accident.⁹ As a result, in those instances (and only in those instances) where the accident arises in the course of the employment but there is evidence

⁵ Social Security Contributions and Benefits Act 1992, s 94.

⁶ For example, in Victoria, the Workers Compensation Act 1958, s 5(1); in Western Australia, the Workers' Compensation Act s 7(1); in Quebec, the Industrial Accidents and Occupational Diseases Act, RSQ, C.A. — 3.001, ss 2 and 44.

⁷ There are other presumptions, notably in ss 5(1), 5(5)(a), (b) and (c), and 5(5A), but these are not relevant to the instant discussion.

⁸ *Lancashire and Yorkshire Rly Co v Highly* [1917] AC 352, 372.

⁹ See *Ho Woon-king v Hong Kong and Kowloon Wharf & Godown Co Ltd* [1965] DCLR 265 and *Yip Ho v Hong Kong and Kowloon Wharf & Godown Co Ltd* [1969] DCLR 1. For a discussion of these cases and the basic condition for qualification for compensation see Robyn Martin, 'Employees' Compensation: Arising Out Of and In the Course of Employment' (1986) 16 HKLJ 71.

that the accident did not arise out of the employment, thereby rebutting the s 5(6) presumption, the worker will have to show some such causal connection between the accident and the nature of the work engaged in, in order to qualify for compensation.

There are two categories of cases in which this interpretation of the 'arising out of the employment' requirement has proved to be particularly problematic.¹⁰ The first is where a worker is injured or dies as a result of an internal physical condition while working. If the court finds that the accident, for instance a blackout or heart attack, was simply caused by the stress and strain of the work, the requirement will be met.¹¹ However, where there is evidence that the condition was pre-existing, the case will be more difficult. Here, this requirement will be satisfied if the work materially contributed to the occurrence of the illness.¹² It need not be the sole cause.

Another category of cases occurring less frequently but confounding the courts rather more is where the worker is the victim of an intentional physical attack while at work. Here there is a greater tendency for the court to find that there is 'evidence to the contrary,' for the purposes of the s 5(6) deeming provision, which then requires the worker somehow to show that the accident did arise out of the employment. Hong Kong courts have been somewhat inconsistent in the approach brought to this group of cases.

For instance, in *Tsang Yuk-chung v China Fleet Club*¹³ the deceased was attacked and killed by a co-worker for no apparent reason. In the absence of evidence indicating a private dispute, the accident was held to have arisen out of the employment, thereby qualifying the deceased's dependents for compensation. However, in two later cases, *Wang Gun-fook v McLean*¹⁴ and *Lai Fong v Shun Fung Ironworks Ltd*,¹⁵ the attacked workers were denied compensation because, although there was no evidence of any particular motive for the attack, the applicants could not show that the attack was connected with the employment or arose out of a risk incidental to the employment. This approach puts a considerable burden on workers gainfully pursuing their employers' interests but nonetheless injured for reasons unrelated to risks peculiar to the employment.

¹⁰ See generally Martin, *ibid*, pp 73–6.

¹¹ As in *Lam Sik v Sen International Ventures Corporation (HK) Ltd* (1994) HCt, ECC No 127 of 1992.

¹² See *Ho Woon-king v Hong Kong and Kowloon Wharf & Godown Co Ltd* [1965] DCLR 265. Often in such cases the court will find that there is no evidence to the contrary and the condition will be established on the basis of the s 5(6) presumption. See for instance *Lam Sik v Sen International Ventures Corporation (HK) Ltd* (1994) HCt, ECC No 127 of 1992 where a sudden blackout was held to have been caused from work fatigue.

¹³ (1973) HCt, WCC No 92 of 1972.

¹⁴ [1973] DCLR 75.

¹⁵ (1977) HCt, WCC Nos 100 and 101 of 1976.

Fung Yin-yee v United Ford Development

The Court of Appeal of Hong Kong recently considered this issue in *Fung Yin-yee v United Ford Development Ltd.*¹⁶ In fact the Court of Appeal was called on to consider both limbs of the requirement, that the accident arose 'out of and in the course of the employment,' because both aspects were disputed by the employer. The four deceased were employed as cooks and cashiers at the appellant's mahjong club. Their shifts had ended but they had remained on the premises, in order to be available to play mahjong with favoured customers who were without partners. While doing so intruders suddenly entered the premises, poured petrol onto the carpet, and set it alight. All four deceased died from inhalation of smoke created by the ensuing fire. The appellant contended that the accident did not arise in the course of the employment, and that it did not arise out of the employment, arguing that the workers were off-duty, were playing mahjong for their own amusement, and the injuries were the result of an intentional criminal act.

The trial judge had found that the accident did arise in the course of the employment and the Court of Appeal confirmed this view. The evidence showed that the manager had suggested to the deceased that they play mahjong after a favoured customer had mentioned his lack of a playing partner to the manager. Although the deceased were not actually ordered to play mahjong, the court accepted that it was not uncommon for employees to be asked to help out after normal working hours, and that their compliance might be due to fear of jeopardising future employment prospects. The court, like the trial judge, also attached considerable weight to the fact that on the Employees' Compensation Ordinance Form 2,¹⁷ the employer answered 'yes' to the question 'Did the accident occur in the course of work?'

The question of whether or not the accident arose out of the employment was rather more difficult. The trial judge had taken the view that the s 5(6) presumption was operative, that is, that there was no evidence to suggest that the accident did not arise out of the employment. He did not consider a criminal attack by arsonists to be evidence to the contrary. However, the trial judge then considered the alternative argument (disregarding the s 5(6) presumption), that in circumstances of an arson attack, there was evidence to the contrary sufficient to rebut the s 5(6) presumption. He found that on the facts, and in the nature of the appellant's business, involving as it does the risk of exposure to criminal aspects of society, the accident did arise out of the employment. Premises such as the appellant's were 'frequently the targets of "protection" and other criminal activities' and 'at the material time the four deceased employees were engaged in work which involved a special risk of

¹⁶ See note 4 above.

¹⁷ Under s 15 of the ordinance the employer of a worker injured or killed is required to complete a report to the Commissioner for Labour on Form 2 of the regulations.

injury from criminal activities aimed at the place where they were working.¹⁸ For an alternative reason the trial judge referred to *Lawrence v George Mathews (1924) Ltd*¹⁹ and Russell LJ's so-called 'fourth proposition' stated therein, to the effect that there was a sufficient causal connection for the purposes of the 'arising out of the employment' requirement 'if the man's employment brought him to the particular spot where the accident occurred, and the spot in fact turns out to be a dangerous spot.'²⁰

The Court of Appeal's approach

The Court of Appeal agreed with the trial judge's view that, the s 5(6) presumption aside, the accident arose out of the employment, but took a simpler and more direct approach. The court considered the two major (and conflicting) lines of English authority on this issue.²¹ In *Holden v Premier Waterproof and Rubber Co Ltd*²² Lawrence LJ had interpreted Russell LJ's proposition to mean that there must be 'some danger inherent in the nature of the particular spot ... it must be a spot which of itself is a dangerous spot — not that it becomes a dangerous spot because an injury is occasioned at that spot ...'²³ This is a restrictive approach, stressing the need for the risk to have been peculiar to the employment, and is not unlike that taken by the courts in *Wang* and *Lai* referred to above.

Against this the court considered the earlier House of Lords decision of *Thom or Simpson v Sinclair*,²⁴ in which a woman working in a fish-curing shed was injured when a wall under construction on contiguous property suddenly collapsed onto the shed. In that case the accident was held to have arisen out of the employment for the purposes of the Workmen's Compensation Act 1906, although clearly the risk was not inherent in the applicant's work as a fish curer. For Viscount Haldane the question was: 'Has the accident arisen because the claimant was employed in the particular spot on which the roof fell? If so, the accident has arisen out of the employment.'²⁵

Thom was later considered in the Privy Council decision of *Brooker v Thomas Borthwick and Sons (Australasia) Ltd*.²⁶ There, buildings had collapsed owing to severe earthquakes, causing debris to fall onto workers. Most were on their

¹⁸ (1992) HCt, ECC Nos 430, 431, and 432 of 1991.

¹⁹ [1929] 1 KB 1.

²⁰ *Ibid*, p 19.

²¹ An anomaly of Hong Kong's workers' compensation law is the frequent reference to early English case law long since obsolete in that jurisdiction. The Hong Kong ordinance is based on the English model first introduced there in 1897. By the time of the coming into force of the Hong Kong ordinance in 1953, the English legislation was already seven years abandoned. For a general critique of the Hong Kong system and its antiquated features, see A H Y Chen and Ng Sek-hong, *The Workers' Compensation System in Hong Kong* (Hong Kong: Centre of Asian Studies Occasional Papers, 1987).

²² (1931) 144 LT 519.

²³ *Ibid*, p 523.

²⁴ [1917] AC 127.

²⁵ *Ibid*, p 134.

²⁶ [1933] AC 669.

employers' premises at the time, although one was in the street on his employer's work. Lord Atkin, giving the opinion of the Board, approved of *Thom*, and with reference to *Lawrence*, said 'the phrase "dangerous spot" used in Lord Russell's judgment for this purpose appears to be a spot which, in fact, turns out to be dangerous.'²⁷ Fuad VP, with whom Nazareth JA and Mortimer J agreed, preferred Lord Atkin's interpretation of Russell LJ's 'fourth proposition,' and took the view that the court was 'effectively bound by the decision ... in *Brooker's* case.' A worker who is injured because his work requires him to be in that place, and who would not have been injured had he not been in that place, has been injured by an accident arising out of the employment.

Significance

This decision is important and promising in a number of respects, and its significance certainly goes well beyond the immediate facts of the case. Although the court failed to articulate a clear policy position as to why s 5(1) should be interpreted in this way, the decision will nonetheless prove to be useful to many workers and their dependents seeking compensation under the Employees' Compensation Ordinance.

By Lord Atkin's reckoning, as accepted now by the Hong Kong Court of Appeal, it is not necessary to consider the cause or occurrence of the accident in light of the nature of the employment or its inherent risks. So for instance, an earthquake that causes the sudden collapse of a factory, or an airplane that crashes into the factory, would constitute an accident arising out of the employment of the factory's workers for the purposes of s 5(1) of the Employees' Compensation Ordinance. This interpretation brings within the ambit of the ordinance a significant group of work accident victims who, under reasoning such as that which prevailed in *Holden* as well as *Wang* and *Lai*, referred to above, would otherwise go uncompensated. After the decision in *United Ford*, cases such as *Wang* and *Lai* will now be decided differently, in favour of the applicants. In fact the victims and families of victims of the firebomb attack on the Hong Kong and Shanghai Bank in Shamshuipo will now also be securely within the protection of the ordinance.

The Court of Appeal's decision in *United Ford* is to be applauded, and constitutes an important piece of judicial legislation. Although the effect is not quite to change the wording in s 5(1) from the conjunctive to the disjunctive,²⁸ something approximating that has been achieved. To summarise, where the s 5(6) presumption is found to be not operative (because there is 'evidence to the contrary'), the accident is now to be treated as arising out of the employ-

²⁷ Ibid, p 677.

²⁸ For instance, it would not likely include the worker who, although in the course of employment, is attacked because of a purely private dispute with the assailant — for such a worker, it would be argued, would have been attacked whether or not the worker was at the work place.

ment if it was the employment that required the worker to be in the place that, in the event, turned out to be dangerous. The applicant will not be required to connect the occurrence of the accident with the nature of the employment. In the absence of much needed legislative reform of workers' compensation law, this is an important development for the protection of workers in Hong Kong.

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Summary Judgment: Law and Procedure in Transition

Introduction

The use and abuse of Order 14

Among the most useful procedures available to plaintiffs is the summary judgment procedure in Order 14 of the Rules of the Supreme Court. In an appropriate case, a plaintiff can apply for summary judgment as soon as the statement of claim has been served and notice of intention to defend has been given.¹ If the application is successful, the court will give the plaintiff leave to enter judgment against the defendant. The significant benefit to plaintiffs is that they save time and avoid the cost associated with a trial of the action. The benefit to the system is that the time and effort of judges and other court personnel are saved for more deserving cases.

Plaintiffs can also use Order 14 in ways which are not beneficial to the system. This misuse, or abuse, is manifested in several ways. First, it is trite law that summary judgment will not be given if a defendant can discharge the onus imposed by Order 14, rule 3 to raise a triable issue.² Yet plaintiffs frequently resort to Order 14 when it should be apparent that the defendant can discharge this onus. Their aim is to force a defendant to go on oath as to the particulars of the defence. When they receive the defendant's affidavit, they often abandon their application, having achieved their goal.³

A variation of this type of abuse of Order 14 occurs when plaintiffs pursue the application to the hearing stage, again without any genuine expectation of

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¹ Ord 14, r 1.

² See, eg, *Jacobs v Booth's Distillery Co* (1901) 85 LT 262 (HL) and *Standard Chartered Bank v Walker* [1982] 1 WLR 1410 (CA).

³ A defendant in such circumstances has no real option but to file an affidavit in response. The danger of not filing an affidavit is evident in *Chinakong Manufactory Limited v Uniden Hong Kong Limited* (1992) HCT, HCA No 8146 of 1991. The plaintiff filed four affirmations but the defendant made a tactical decision not to file an affirmation. Kaplan J said it was the rule and the clear practice of the court that a defendant must, except in the most unusual cases, file an affidavit either verifying the contents of the exhibited defence or setting out the details of the defence. He gave leave to the plaintiff to enter judgment.